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What Does "Negligence" Mean in Defamation Cases?

By MARC A. FRANKLIN*

I

Introduction

When *Gertz v. Robert Welch, Inc.*,¹ was decided ten years ago, much was said about the impact it would have on several areas of defamation law.² It was obvious that the decision was introducing a variety of new terms and concepts and would alter the way in which actions by private plaintiffs against media defendants had been litigated—and the way in which the media would attempt to cope with its strictures. A decade later it is appropriate to see how courts have met the challenge in one important area—the administration of the Court's statement that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."³

The introduction of "fault" analysis in defamation cases, although not unprecedented,⁴ was bound to create a new range of uncertainty. The first question involved identifying standards that would avoid liability without fault. Although the Court's opinion did not use the word negligence,⁵ courts

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1. 418 U.S. 323 (1974).

2. E.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

3. *Gertz*, 418 U.S. at 347 (footnote omitted).

4. Stevens, *Negligence in Defamation Before Gertz*, 56 JOURNALISM Q. 832 (1980).

5. Four minority opinions did use the term. See 418 U.S. at 353 (Blackmun, J.,

quickly concluded that this was the minimum that would meet the Court's requirement.⁶ No court has sought to impose liability in a "Gertz" case on any showing of fault that amounts to less than traditional negligence. Those that have deviated from the negligence standard have adopted requirements that are more onerous than that of negligence.⁷

But even if the standard is negligence, this does not necessarily mean that the emerging action need resemble in every way other actions for negligence, such as those involving automobile accidents. An early debate suggested the range of disagreement on this question.

Professor David Anderson⁸ began from the premise that the *New York Times* decision⁹ had addressed the wrong end of the litigation by making its privilege applicable according to the subjective state of mind of the defendant. This tended to increase the costs of defending libel actions, even if they were eventually won by the media defendant. He thought this weakness of analysis was exacerbated by *Gertz*, which would necessarily produce more suits and more trials than had the *Times* decision. In the hope of cutting losses, Anderson argued that the traditional flexibility of ordinary negligence cases could not be allowed to prevail in libel cases tried under the *Gertz* rationale:

[F]ew would deny that negligence in the physical torts represents a very flexible mechanism for obtaining the judgment of both judge and jury on a specific fact situation. But negligence under *Gertz* serves an entirely different purpose—the preservation of a minimum area of "breathing space" for the press—which it attempts to accomplish by freeing publishers and broadcasters from liability for innocent misstatements. *Gertz* envisions a regime in which publishers who exercise reasonable care need not fear libel judgments, but the hope that

concurring); *id.* at 360 (Douglas, J., dissenting); *id.* at 369 (Brennan, J., dissenting); *id.* at 376 (White, J., dissenting).

6. See, e.g., *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975).

7. See, e.g., *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). Even if "negligence" comes to be the constitutional minimum, the term may have different meanings in constitutional law and in common law. That is, the Supreme Court may find that the elements of "negligence" are less demanding than those that might be demanded by a state in its definition of the term. For simplicity, this Article assumes that the word will be given the same meaning by both state and federal courts.

8. Anderson, *supra* note 2.

9. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

this will prevent unnecessary self-censorship is illusory. No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict.¹⁰

Professor Anderson thus advocated restrictions on the *Gertz* version of the negligence action that would protect media defendants from unwarranted liability. These included analogies to cases where a professional's conduct was judged by existing tort principles, requiring the professional to "exercise the skill and knowledge normally exercised by members of his profession."¹¹ Applying this standard to journalists would mean that the reasonableness of their conduct would be judged according to existing journalistic standards. Within the medical profession lines were drawn in terms of the standards of conduct followed in the doctor's community or in comparable communities or by practitioners of the same school.¹² Applying this standard to journalists would differentiate between newspapers and magazines, between print media and broadcast media, and between those entities that stress vigorous investigative reporting and those that do not. It was particularly important to judge defendants "by the standards of publishers with comparable resources, deadline pressures, space limitations, and technological capabilities. To do otherwise would create an unwelcome pressure for uniformity."¹³ Although Professor Anderson recognized that geographical differences would not play nearly as great a role in journalism cases as in medical cases, "journalistic practices that Keokuk would find unreasonable might be fully accepted in New York."¹⁴

Professor Anderson was particularly concerned that courts not adopt the standard suggested in the *Butts* and *Walker* cases by Justice Harlan: "standards of investigation and reporting ordinarily adhered to by responsible publishers."¹⁵ Professor Anderson doubted that such a single standard in fact existed in journalism. Even if such a standard did exist, it would impose a bias in favor of the orthodox media that were rarely involved in investigative journalism. He was particularly concerned that magazines would suffer because they

10. Anderson, *supra* note 2, at 460 (footnotes omitted).

11. *Id.* at 466.

12. See, e.g., W. PROSSER, HANDBOOK ON THE LAW OF TORTS 163 (4th ed. 1971).

13. Anderson, *supra* note 2, at 467.

14. *Id.*

15. *Id.* at 466 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 138 (1967)).

spend more of their time than do newspapers, investigating the underlying aspects of society.¹⁶ His discussion implied recognition that such an approach would require expert witnesses,¹⁷ as is common in other claims of professional negligence.¹⁸

Finally, consistent with his view that the negligence standard is constitutionally required in journalism cases, Professor Anderson argued that other procedural protections derived from the *Times* case should be applied to *Gertz* cases as well. These included the requirement that the requisite fault be shown with convincing clarity¹⁹ and that appellate courts should exercise independent review of the jury's verdict.²⁰ An ordinary negligence standard would be procedurally inadequate because it would give judges little opportunity to review and reverse inconsistent decisions. A body of conflicting holdings would no doubt develop. The resulting uncertainty surrounding the liability rules would induce risk-averse media to refuse to publish some material that would cost excessive amounts of time or money to verify with certainty. These problems could be minimized by the use of the convincing clarity requirement and the use of rigorous appellate review.

Professor Anderson concluded by noting that *Gertz* had introduced into defamation, "a field whose own vocabulary is complicated enough, the vocabulary of negligence law as developed in the physical torts. Much of that vocabulary is inappropriate, confusing, or incomprehensible when applied to communications torts."²¹ He feared that this development might lead courts to lose sight of the constitutional role that they were required to play in all libel cases, whether under the *Times* or the *Gertz* regimes.²²

Even with his proposed protections, Professor Anderson thought *Gertz* an unfortunate decision for three reasons: it increased the incentive to self-censor because it increased the likelihood of recovery in cases brought by private individuals;²³ it favored journalistic orthodoxy because the conventional press was more likely to focus its attention on government and

16. Anderson, *supra* note 2, at 454.

17. *Id.* at 466-67.

18. P. MUNCH & D. SMALLWOOD, PROFESSIONAL LIABILITY 70 (1976).

19. Anderson, *supra* note 2, at 467-68.

20. *Id.* at 467-68.

21. *Id.* at 480.

22. *Id.* at 468.

23. *Id.* at 441-52.

public figures, leaving coverage of privately exercised power to magazines and newspapers that emphasize investigative reporting;²⁴ and *Gertz* was unlikely to lend itself to summary judgments.²⁵

Professor David Robertson responded to his colleague Professor Anderson by praising *Gertz* as a sensible balance of conflicting interests.²⁶ Even though he noted that some negligence concepts had permeated defamation law before *Gertz*, he recognized that no solid body of such law existed:

The law must create a largely new sub-species of negligence, and some observers believe that defamation law requires standards considerably more specific than are usual in physical tort cases to avoid needless self-censorship. It is much more likely that intelligible standards will develop piecemeal on the basis of post-*Gertz* decisions focusing closely on the issue of journalistic negligence, than that they will spring full-blown from the minds of judges or commentators.²⁷

Moreover,

[o]nce standards of conduct are determined for a variety of concrete fact situations, the standards for other fact situations follow naturally in the common law tradition of extension by analogy. An overall standard begins to emerge, albeit in a patchwork fashion. So long as the post-*Gertz* case law, when taken as a whole, clearly defines an acceptable level of conduct and sets the burden of ensuring accuracy within reasonable bounds, any resulting increase in self-censorship should be small and acceptable.²⁸

Beyond this general discussion, Professor Robertson suggested some specific points that would make the *Gertz* introduction of negligence less troublesome than Professor Anderson had feared. He, too, rejected Justice Harlan's standard of "responsible publishers" as too confining and too oriented toward the establishment media.²⁹ He disagreed, however, over the role of experts and the use of self-set journalistic standards. The cases did not present the "technical complexity involved in malpractice or antitrust suits, and seem to be within the potential understanding of a jury."³⁰ Robert-

24. *Id.* at 453-56.

25. *Id.* at 456-58.

26. Robertson, *supra* note 2, at 200-01.

27. *Id.* at 254-55 (footnotes omitted).

28. *Id.* at 257.

29. *Id.* at 257 n.367.

30. *Id.* at 259.

son foresaw the use of experts "only in exceptional cases."³¹

Robertson then discussed behavior that he believed should not be negligence, such as failing to verify a story from a wire service, unless the facts were so improbable that reliance would not be reasonable or unless the "facts [were] particularly easy to check because of special circumstances."³² A publisher who published a story either after checking the source and reasonably concluding the source was trustworthy, or after reasonably checking the accuracy of the story itself, "should be able to avoid liability for negligence."³³ He also suggested that if the publisher identified the source of a story "so that the credibility of the newspaper no longer supports the truth of the statement" and gave the defamed person "equal time" in the story, the publisher should be able to carry stories that cannot be verified.³⁴ Finally, Professor Robertson agreed with the importance of "de novo" judicial and appellate review of jury action³⁵ but disagreed that the standard of proof should be "clear and convincing."³⁶

The debate was carried on with the benefit of very few cases on the books. Indeed, much of the tenor of the discussion was concern about how *Gertz* would operate in fact. It is appropriate to withhold further discussion until after a review of how the courts have responded to this aspect of *Gertz*. We will then return to see whether Professor Anderson's concerns have been borne out in practice and, if so, whether they are serious enough to warrant change.

II

The Case Law

Although *Gertz* permitted the states to adopt any standard other than strict liability, negligence has been by far the most popular choice. At least twenty-six states and the District of Columbia have adopted this standard.³⁷ Federal courts have

31. *Id.* at 259; *cf.* *Kohn v. West Hawaii Today, Inc.*, 656 P.2d 79 (Hawaii 1982).

32. Robertson, *supra* note 2, at 262.

33. *Id.* at 263.

34. *Id.* at 264-65; *see also* Note, *Libel and the Reporting of Rumor*, 92 YALE L.J. 85 (1982); *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977).

35. Robertson, *supra* note 2, at 249-50.

36. *Id.* at 248.

37. See the list in *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376, 385-86 n.3 (Fla. Dist. Ct. App. 1982), *appeal pending*. New York may apply negligence in certain types of

interpreted the law of three additional states as imposing a negligence standard.³⁸ Every court so concluding has had to decide whether to adopt the professional negligence standard or the ordinary negligence standard.

The Restatement (Second) of Torts appeared to adopt a professional negligence standard for *Gertz* cases,³⁹ but few states have followed suit.⁴⁰ Of these, only the Utah Supreme Court explained its reasons for preferring the professional negligence standard to the ordinary negligence standard. It asserted that an ordinary negligence standard would undercut the first amendment protections by permitting juries to equate falsity with negligence.⁴¹

A key element in the professional negligence formula is the choice of the applicable body of customs and practices against which to judge the defendant. In the medical malpractice field, as we have seen,⁴² several rules defining the relevant body have evolved. The states that have adopted a professional negligence standard for journalism have not stated which, if any, related aspects would also be used. Two potential candidates for adoption are the school rule and the locality rule. The former provides that the defendant is to be judged only by the customs followed by members of the school of practice to which the defendant belongs. In media cases, this rule could be used to develop separate standards for the various "schools" of journalism, such as investigative and documentary, or, perhaps, newspaper, magazine, radio and television.

The locality rule is losing strength in medical malpractice cases.⁴³ Although it may still be unrealistic to blur differences between small-town practitioners and their metropolitan counterparts, small-town physicians should know which cases can be handled locally and which should be transferred to skilled specialists or to hospitals with better facilities. In media cases there is no discussion of transferring big investigative efforts to

cases. See *Gaeta v. New York News, Inc.*, 95 App. Div. 2d 315, 466 N.Y.S.2d 321 (1983), *rev'd* 62 N.Y.2d 340 (1984).

38. *Miami Herald*, 423 So. 2d at 386 n.3.

39. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1976).

40. The professional negligence standard has been adopted in *Gobin v. Globe Pub. Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981).

41. *Seegmiller*, 626 P.2d at 976; RESTATEMENT (SECOND) OF TORTS § 580B comment g (1976).

42. See P. MUNCH & D. SMALLWOOD, *supra* note 16, at 70.

43. See, e.g., *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977).

larger journals. Indeed, some cases explicitly recognize that limited financial resources of the media defendant should be taken into account.⁴⁴

Most states have rejected the professional negligence standard in favor of the ordinary negligence formula.⁴⁵ Some courts assert that the professional negligence standard is appropriate for use only in fact situations that are beyond the comprehension of laymen, and that defamation cases do not fit this description.⁴⁶ Others express the fear that permitting the media to set their own standards would encourage industry-wide carelessness and result in progressively declining care.⁴⁷

Trial courts have been given little guidance as to what factors are relevant to the determination of negligence. The *Restatement* offers one possible list: the trier should consider the need for prompt publication, the public value of the story, and the potential damage to the plaintiff's reputation.⁴⁸ One court has offered an expanded list:

- 1) The nature of the information published, the importance of the matter involved, and specially, if the same is defamatory *per se* and the risk of damages can be foreseen.
- 2) Origin of the information and reliability of its source.
- 3) Reasonableness in checking the veracity of the information considering its cost in terms of money, time, personnel, urgency of the publication, nature of the news and any other pertinent element.⁴⁹

In most cases, only fault, not falsity, was at issue. The decided cases appear to fall into four groups, based on the apparent source of the error involved, though some cases involved multiple errors. The first group includes those cases in which the error arose during the gathering of information. The source of the error is found to be the person or organization giving the reporter information. The second group includes cases in which the error is found to have arisen from a re-

44. See, e.g., *Greenberg v. CBS, Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (1979).

45. See, e.g., *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); *Schrottman v. Barnicle*, 386 Mass. 627, 437 N.E.2d 205 (1982); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978).

46. See *Kohn v. West Hawaii Today, Inc.*, 656 P.2d 79, 83 (Hawaii 1982).

47. See, e.g., *Troman*, 62 Ill. 2d at 198, 340 N.E.2d at 298-99. No court bases its decision on the fact that journalists are not required to have academic training or on the fact that they are not licensed.

48. RESTATEMENT (SECOND) OF TORTS § 580B comment h (1976).

49. *Torres-Silva v. El Mundo*, 3 MEDIA L. REP. (BNA) 1508, 1511 (1977).

porter's mistake in recording the information. In the third group, the error is found to have occurred at the reporting stage—the reporter either draws inaccurate conclusions or conveys to readers a different sense than the reporter intended to convey. The fourth group contains one case in which the error resulted from a problem in the production process.

The most common type of error was the first, in which the reporter has been given inaccurate, defamatory information.⁵⁰ These cases center on whether the defendant's investigation was reasonable. Most of the discussion has revolved around the reliability of the original source. The development of clear rules indicating which sources may be relied upon without fear of liability would be quite valuable and would support the acceptability of the ordinary negligence standard. Unfortunately, the courts have not been consistent in assessing the reliability of sources, or in the protection they give to media that relied upon apparently authoritative sources.⁵¹ Two cases illustrate the problem.

In *Wilson v. Capital City Press*,⁵² the defendant erroneously stated that the plaintiff had been among those arrested in a recent drug raid. The paper had obtained the arrest list, which contained the error, from the public relations director of the Louisiana State Police. The trial judge, sitting without a jury, found the paper negligent in not checking further. The appellate court vacated the award, holding that the defendant's reliance on that source was not negligent as a matter of law. In *Mathis v. Philadelphia Newspapers, Inc.*,⁵³ the plaintiff's picture had been incorrectly printed along with those of suspects in a local bank robbery. One defendant contended that the FBI had provided what it said were photographs of the suspects and that Mathis's photograph was included. On a motion for summary judgment, the court stated that reliance on the FBI would not, as a matter of law, preclude a finding of negli-

50. See, e.g., *Thomas H. Maloney & Sons v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494, 72 Ohio Op. 2d 313 (1975); *Jenoff v. Hearst Corp.*, 453 F. Supp. 541 (D. Md. 1978); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 40 (E.D. Pa. 1978); *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 308, 560 P.2d 1216 (1977); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980).

51. This inconsistency is particularly troublesome for multistate publications, whose editors and legal staffs cannot be sure whose law will apply under conflicts of law doctrine.

52. 315 So. 2d 393 (La. App. 1975).

53. 455 F. Supp. 406 (E.D. Pa. 1978).

gence.⁵⁴ Even reliance on two separate sources has not protected defendants from being found negligent.⁵⁵

A subset of this group involves cases in which the reporter *does* become aware of contradictory information.⁵⁶ In these situations, the reporter has been given conflicting versions of the facts, and knows that at least one version is inaccurate. The reporter's proper course of action in this situation is not clear. *Gertz* implies that a reporter should be permitted to publish a story where the facts are in dispute, so long as due care with regard to truth is employed.⁵⁷ But does this permit a reporter to use a balanced report on two sides of a dispute if he cannot reasonably determine the truth? Professor Robertson suggested that due care in such a case requires only that the reporter indicate in the story that the facts are uncertain, and attribute the conflicting statements to their sources.⁵⁸ He reasoned that publication in this manner informs the public of the dispute without vouching for the truth of either side, and that this represents a satisfactory balance between the interests of the plaintiff and the public. The controversial doctrine of neutral reportage⁵⁹ aside, the courts require that once the reporter has been put on notice that some of his information is incor-

54. The *Mathis* court addressed the issue of reasonable reliance in dictum. It denied the defendant television station's motion for summary judgment on the ground that there was a genuine issue of fact as to whether the FBI was even the source of the erroneous photograph. If the source issue were favorably resolved, the defendant could "argue to the jury that the FBI's proven record of reliability in supplying information made it entirely reasonable for [defendant] to assume . . . that the FBI had once again supplied an accurate photograph." *Id.* at 414. The *Wilson* court was clearly more willing to find reasonable reliance, or non-negligence, as a matter of law.

55. *E.W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700 (Ky. Ct. App. 1978). A survey of texts on journalistic practice revealed that Woodward and Bernstein's requirement of two independent sources in their investigation of Watergate was based on the anonymity of the sources. Requiring two sources in other situations is "relatively rare in newswork." G. TUCHMAN, *MAKING NEWS* 85 (1978). To find negligence for relying on one source, no matter how reliable, would create liability for the vast majority of reporters. To impose liability where two independent sources were relied upon would push the liability to extreme limits. *But see* Brosnahan, *First Amendment Jury Trials*, *LITIGATION* Summer 1980, at 28 (asserting that reporters who have two sources for the story are likely to make good witnesses).

56. *See, e.g.,* *Peagler v. Phoenix Newspapers Inc.*, 114 Ariz. 308, 560 P.2d 1216 (1977); *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376 (Fla. Dist. Ct. App. 1982), *appeal pending*; *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 882 (Ky. 1981).

57. *See* *Peagler v. Phoenix Newspapers*, 131 Ariz. 308, 312, 640 P.2d 1110, 1114 (1982).

58. Robertson, *supra* note 2 at 264.

59. *See* *Edwards v. National Audubon Soc'y*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977). Note, *A Constitutional Privilege to Republish Defamation Should Be Rejected*, 33 *HASTINGS L.J.* 1203 (1982).

rect, his duty is to make a reasonably thorough investigation.⁶⁰

The second type of error results from a mistake made while recording the information.⁶¹ The claim may be that the reporter was negligent in making the error in the first place by mishearing, misremembering or miswriting his notes. In *Schrottman v. Barnicle*,⁶² for example, the defendant had published an article on conditions in the plaintiff's section of town. Schrottman, who was white, was quoted in the article as saying that "life on Blue Hill Avenue . . . is 'o.k. if you're a nigger.'" ⁶³ The plaintiff admitted speaking with the reporter but denied having made that statement.⁶⁴ In remanding the case for retrial, the court suggested that the trier "could consider the testimony concerning Barnicle's note-taking and research methods, as well as the clarity and reliability of the notes themselves. This evidence should be viewed in light of circumstances including the relative risk of harm and the presence or absence of time constraints against verification."⁶⁵

But there seems to be no need, and no opportunity to recognize the need, to verify a quotation taken directly from a source if that quotation does not itself implicate others or create a contradiction. If it does implicate others or create a contradiction, how does one check such a quotation? Must any quotation that might prove embarrassing in any situation be submitted to the source for review and a second thought? What if the "direct source" takes this second occasion to deny having made the remark to the reporter?

If the reporter's alleged error occurs in connection with the source's statement about another person, the claim will be that the reporter was negligent in failing to seek additional verification before publication. The considerations here are similar to those in the first group of cases. (Indeed, if the credibility conflict is resolved for the reporter and against the source, the case belongs in the first group.)

60. See *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376; *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 882 (Ky. 1981); *Peagler v. Phoenix Newspapers*, 131 Ariz. 308, 640 P.2d 1110.

61. See, e.g., *Jones v. Sun Publishing Co.*, 292 S.E.2d 23 (S.C. 1982); *Jenoff v. Hearst Corp.*, 453 F. Supp. 541 (D. Md. 1978); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980).

62. 386 Mass. 627, 437 N.E.2d 205.

63. *Id.* at 628, 437 N.E.2d at 207.

64. See *infra* note 104.

65. *Schrottman*, 386 Mass. at 641, 437 N.E.2d at 214.

The third group of cases includes those in which the error occurred when the reporter incorrectly drew a conclusion or the report was ineptly worded.⁶⁶ Here, the individual facts are correct, but incorrect implications are drawn. Whereas the errors in the previously discussed groups result from the *inclusion* of inaccurate data, the errors in this group usually stem from the *absence* of important explanatory information. It can be extremely difficult to determine when the failure to discover the problem and add new information (or delete some statements) constitutes negligence. In *Benson v. Griffin Television, Inc.*,⁶⁷ the defendant had broadcast a report incorrectly implying that police suspected that the plaintiff was involved in a bank robbery. The reporter had concluded that the plaintiff was considered a suspect because the police had converged on a house that might have been the plaintiff's and questioned its occupant about the plaintiff's whereabouts, and because some police officials said that the plaintiff had been seen in a car they thought had been used in the robbery. The plaintiff, in fact, was never actually considered a suspect. The defendant's summary judgment was upheld on appeal. The appellate court observed that "[t]he report on the air, although erroneous, reasonably reflects what a reporter could have concluded based on the undisputed facts. The reporter noted what he observed, was reasonably faithful to those observations, and displayed no indifference or negligence regarding their accuracy."⁶⁸

In *Memphis Publishing Co. v. Nichols*,⁶⁹ the defendant had published an article stating that the plaintiff (Mrs. Nichols) had been shot by Mrs. Newton after the latter had appeared at the Nichols home and found Mr. Newton there with Mrs. Nichols. This story created an erroneous implication of an adulterous relationship between the plaintiff and Mr. Newton. In reality, not only were Mrs. Nichols and Mr. Newton at the Nichols home, but so were Mr. Nichols and two neighbors, all of

66. See, e.g., *Lake Havasu Estates, Inc. v. Reader's Digest Ass'n*, 441 F. Supp. 489 (S.D.N.Y. 1977); *Benson v. Griffin Television, Inc.*, 593 P.2d 511 (Okla. Ct. App. 1978); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981). Inept wording may be attributable to the editing process as well as to the reporter's initial choice of words. These cases differ from those in the first group because in these cases, the reporter has received accurate, if incomplete, information, whereas in the first group, the information itself, not any resulting conclusions, caused the problem.

67. 593 P.2d 511 (Okla. Ct. App. 1978).

68. *Id.* at 514.

69. 569 S.W.2d 412 (Tenn. 1978).

whom were sitting in the living room, talking. The story was apparently based on the arrest record of the shooting incident, which made no mention of those at the house other than Mrs. Nichols and the Newtons. The trial court directed a verdict for the defendant on the ground, among others, that no fault had been shown. That judgment was reversed on appeal because the trier of fact could find negligence in the reporter's reliance on the contemporaneous arrest report rather than investigating further or waiting for the more complete offense report that is filed a few days later.⁷⁰

The fourth category of cases is based on the simplest and least common type of suit-producing error, a technical production mistake. The issue might involve the failure to catch typographical errors⁷¹ or the inclusion of unintended material.⁷² This type of error is the only one that appears not to involve any real degree of journalistic skill or judgment. It most closely resembles more common forms of negligence and might benefit most from the use of outside analogies.

70. For other cases discussing the desirability of reporting stories as quickly as possible, see *Phillips v. Evening Star*, 424 A.2d at 83; *Liquori v. Republican Co.*, 8 Mass. App. Ct. 671, 678 n.7, 396 N.E.2d 726, 730 n.7 (1979); *Benson v. Griffin Television, Inc.*, 593 P.2d at 514.

71. The issue of failing to proofread raises the question of whether the print media might be held to a standard of perfection in finding typographical errors. Yet, a standard of negligence does not equate imperfection with fault. *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 319 265 N.E.2d 762, 767, 317 N.Y.S.2d 347, 353 (1970) (even an expert golfer may hit a bad shot without necessarily being negligent). The New York court, though applying a standard more stringent than ordinary negligence, accepted that in the production of a newspaper, some typographical errors will result, without exposing the defendant to liability. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 200, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 65 (1975).

In the first three categories, the author was aware that he was hurting the reputation of another. It is not clear that a publisher, even if negligent as to a typographical error, will be liable if the error turns an otherwise innocent story into a defamatory one. In *Gertz*, the Court observed that its acceptance of negligence applied only to statements in which the substance of the statement "makes substantial danger to reputation apparent;" different considerations would apply "if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." 418 U.S. at 348. Apparently, the Court was suggesting that a statement published with awareness that it would cause reputational harm, or which the reasonable editor should have realized had that potential, would be judged more rigorously than would be errors that surprisingly convert apparently innocuous statements into defamatory ones.

72. See *Pettengill v. Booth Newspapers, Inc.*, 88 Mich. App. 587, 278 N.W.2d 682 (1979).

III Other Data

Several studies of the operation of defamation litigation show that *Gertz* defendants do indeed fare poorly in general, and also when compared with defendants under the *New York Times* standard.⁷³ One study showed that plaintiffs won five of twenty-four *Gertz* cases compared with five of seventy-five *Times* cases.⁷⁴ A more recent study, looking at the matter in terms of defendants' success on appeal, found no case "tried to a negligence standard in which a verdict or judgment for the plaintiff was reversed based exclusively upon an appellate ruling that the finding of negligence was erroneous."⁷⁵ Comparable data for *Times* cases showed that defendants were able to overturn "actual malice" findings in nine of fourteen cases.⁷⁶

Other evidence confirms the difference between the two standards. During one period, for example, defendants prevailed on fifty-five of sixty-six motions for summary judgment in *Times* cases—a success rate of eighty-three percent. During that same period defendants succeeded in two of six motions for summary judgments in *Gertz* cases.⁷⁷ The data show not only a lower grant rate in contested cases but also that far fewer defendants even seek summary judgment in *Gertz* cases.⁷⁸

Although defendants fare worse under *Gertz* than they do under *Times*, some data indicate that both groups fare so badly before juries under both doctrines that sometimes it is hard to tell the difference. In one study *Gertz* plaintiffs obtained jury verdicts in twenty-five of twenty-nine cases, a success rate of

73. Franklin, *Suing Media for Libel: A Litigation Study*, 3 AM. B. FOUND. RESEARCH J. 795, 824-25 (1981). Among publishers, attitudes toward success in litigation may be determined more by the number of suits filed and the time and expense needed to resolve them than by the number won. See Franklin, *Good Names and Bad Law: A Critique of Libel and a Proposal*, 18 U.S.F.L. REV. 1, 13-23 (1983).

74. Franklin, *Suing Media for Libel*, *supra* note 73, at 824-25.

75. LIBEL DEFENSE RESOURCE CENTER, BULLETIN NO. 6, 35, 42 (1983) [hereinafter cited as LDRC].

76. Franklin, *Suing Media for Libel*, *supra* note 73, at 824.

77. LDRC, *supra* note 75 at 41.

78. Although it is true that the reported cases have yielded about three *Times* cases for every *Gertz* case, this does not begin to explain the disparity between the two sets of summary judgment motions. See Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455, 492 (44 *Times* cases to 15 *Gertz* cases); Franklin, *Suing Media for Libel*, *supra* note 73, at 824 (75 *Times* cases to 24 *Gertz* cases plus eight cases using a standard higher than *Gertz*).

eighty-six percent. Yet this was the same percentage of plaintiffs that prevailed before juries under the *Times* standard—forty-one of forty-eight.⁷⁹ This appears to support those who assert that either juries do not understand the great difference between proving negligence by a preponderance and proving actual malice with convincing clarity, or they consciously disregard fault instructions and impose liability because they have found falsity or because of extraneous biases or sympathies.⁸⁰ Another explanation may be that so many *Times* cases are being weeded out on summary judgment that only the very strongest are getting to juries.

Even though defendants may prevail on other grounds in *Gertz* appeals,⁸¹ it apparently has rarely been on the ground that the jury's finding of negligence was not supported by the evidence. When this is combined with the limited use by trial judges of judgment n.o.v.⁸² and the rare granting of summary judgments, it is clear that the jury is playing an exceedingly powerful role in *Gertz* cases. Whatever constitutional protection the Supreme Court envisioned judges affording in *Gertz* cases, their role is not apparent in practice.⁸³

79. LDRC, *supra* note 75, at 42.

80. See Brosnahan, *supra* note 55, at 30 ("[p]laintiff cannot over try the falsity issue. Counsel should carefully build a vivid picture of falsity."); Brill, *Inside the Jury Room at The Washington Post Libel Trial*, AM. LAW., Nov. 1982, at 93 (reporting jury confusion about "actual malice"). See also the statement attributed to Jonathan Lubell, a lawyer who has represented libel plaintiffs, to the effect that the trend of jury verdicts against the press indicates that "the public believes that the media generally look at themselves as answerable to nobody, and the public wants the media to be answerable like any institution." Quoted in advertisement by Mobil Corp., N.Y. Times, Sept. 15, 1983, at 25.

81. See Franklin, *Suing Media for Libel*, *supra* note 73, at 824.

82. Goodale, *Survey of Recent Media Verdicts, Their Disposition on Appeal and Media Defense Costs*, 1983 MEDIA INSURANCE: PROTECTING AGAINST HIGH JUDGMENTS, PUNITIVE DAMAGES, AND DEFENSE COSTS 13, 20-24 (P.L.I.).

83. In addition to examples already noted see *Sibley v. Holyoke Transcript Telegram*, 391 Mass. 468, 461 N.E.2d 823 (1984). The defendant had published an article stating that the plaintiffs were being investigated for fraud. The article summarized an affidavit filed by a police lieutenant that quoted former employees of the plaintiff accusing him of various crimes. The reporter spoke with the district attorney and the chief of the police department and attempted to contact the officer who filed the affidavit. During the libel trial, two of the former employees reaffirmed their accusations. The jury nonetheless found for the plaintiff. A motion for judgment n.o.v. on the ground that there was insufficient evidence to permit a finding of negligence was denied. The judge stated that the jurors

might well have concluded that if the reporter had personally contacted [the former employees] before writing the article, he would have recognized the weaknesses of their statements and been more circumspect in his account of their accusations. They could, I think, find on that evidence that more proba-

It is hard to tell whether insurance affects this analysis because so little information is readily available.⁸⁴ It seems likely that at least twenty-five percent of newspapers and broadcasters are uninsured.⁸⁵ These are generally the smaller and less affluent ones, though the *New York Times* is also a member of the group.⁸⁶ Some insurers base their premiums exclusively on the size of a newspaper's circulation or a broadcaster's rate cards after a brief inquiry into the applicant's claims history. Given comparable claims histories, two publications of equal size would pay the same rate even if one is an aggressive investigative publication and the other simply publishes handouts from public relations sources.⁸⁷ Although the insured has little control over the size of the premium,⁸⁸ the existence of insurance does not remove editorial timidity for two reasons: the danger of an adverse claims history for future years and the universal use of a "deductible" or "retention" approach. This means that the insured is liable for the first expenses on each

bly than not there was a causal connection between the reporter's failure to more thoroughly investigate the facts and the publication of the offensive article.

Id. at 2498.

The judge did grant judgment n.o.v. on the basis of the fair report privilege. *See also* *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. Sup. Ct. 1974), *vacated and remanded*, 424 U.S. 448 (1976).

84. Goodale, *supra* note 82, at 25.

85. This is a very rough estimate. *See* Anderson and Murdock, *Effects of Communication Law Decisions on Daily Newspaper Editors*, 58 JOURNALISM Q. 525 (1981) (reporting that of 103 newspaper editors surveyed, 74.8% reported that their papers carried libel insurance. A further breakdown reveals that 17% did not carry insurance; six percent were not sure; and two percent did not answer.). *See also* Kupferberg, *Libel Fever*, COLUM. J. REV., Sept./Oct. 1981, at 36, 39: "Today, depending on whose estimate you accept, 40 to 60 percent of all broadcasters and newspapers carry some libel insurance."

86. Kupferberg, *supra* note 85, at 39: " 'It's considered an aberration,' *Times* lawyer Baker says, 'but we don't want people to think they're going to have an easy mark.' For the same reason, Baker says, the *Times* has a policy of not settling libel suits for money (as opposed to a correction)."

87. For example, the application for insurance sold through the National Association of Broadcasters (NAB) has a question asking for the claims record of the applicant for the preceding five years. The application has no space for a description of the applicant's programming practices.

88. Although a poor claims record might adversely affect the insured's future premiums, a policy of great conservatism might get the insured a five percent discount for each consecutive claims-free year (up to a limit of five years) under the NAB policy, for example. The insured, however, might find any such gain more than offset by its share of the costs attributable to those in the group whose practices provoked lawsuits, whether or not justified. The point is that once insurance is acquired, there is a limit to the control the insured has over the size of the premium.

claim that is filed against it, ranging in amount from \$1,000 for small newspapers and broadcasters to as much as \$500,000 for larger ones.

For other insurers, content is central to the risk being insured. In one policy, for example, after a coverage amount and deductible or retention are chosen, various plus and minus factors are applied to get the precise premium. If the applicant uses "Call in Hotline, Call for action, etc.," a negative factor of five to twenty-five percent is invoked; if the station has a delay system it gets a credit of zero to forty percent; "Unusually Controversial Programs" involve a debit of five to twenty-five percent. Other factors include whether or not a law firm reviews controversial programming, the role of network programs and local programming, and the use of news wire services.⁸⁹ The wide range in the debits and credits permits room for differences in each case. In this situation, the applicant immediately recognizes the direct impact on the premium of the present and possible future programming. Though the two rating approaches are unlikely to differ in their effects on day-to-day editorial decisions, the latter approach seems more likely to influence fundamental decisions about media style and the use of investigative reporting.

The size of libel insurance premiums—which depends on prior claims history, the limits of the coverage, the deductible, or retention of initial responsibility, and the nature of a variety of other clauses—ranges upward from as little as \$200 per year for a small broadcaster.⁹⁰ Surcharges of twenty-five to fifty percent are likely to apply to media applicants from one or more states in which the particular insurer has had bad experi-

89. See Broadcasters Broad Form offered by Employers Reinsurance Corp. as filed with the Nevada Insurance Department in April 1983.

90. A small radio broadcaster (one who charges no more than \$20 for its highest commercial minute) can obtain coverage of up to \$1,000,000 per occurrence, with a \$2,000,000 annual aggregate and a deductible of \$1,000, for \$200 per year. For small television stations, the same coverage would cost 90% of their highest hourly program rate subject to a minimum rate of \$350 per year. These policies and rates are available on standard forms supplied by the NAB. The claim-free discount cannot bring the rate below the minimum figures. Although a significant number of radio stations can qualify for the minimum rates, the rates for most television stations tend to run in the \$600-700 range.

A daily newspaper with a circulation of 10,000 can get \$1,000,000 coverage per occurrence and a deductible of \$2,500, for \$800 per year. For a daily with a circulation of 75,000 to 100,000, coverage of \$1,000,000 with a deductible of \$10,000 per occurrence costs roughly \$3,000. For a city magazine with a circulation of about 50,000, coverage of \$1,000,000 with a deductible of \$7,500 costs roughly \$1,250. The newspaper figures are

ence,⁹¹ though some smaller insurers do not use such surcharges because their experience is not large enough to justify the differentials.

One point to be observed from this brief look at insurance is that the premium tells only part of the story. The crucial part appears to be the deductible or retained risk, which must be expended in every case brought against the insured. In the case of a city magazine,⁹² for example, the exposure to \$7,500 in costs in every libel claim brought against it, may be more important than the fact that annual protection costs only \$1,250.

Whatever unease is felt by insured publications and broadcasters must be felt even more strongly by uninsured publishers and broadcasters. Why are so many commercial ventures still uninsured, even after the recent spate of attention to defamation? Recently, media owners have become painfully aware of the problem of the *Alton Telegraph*, a paper with a circulation of 38,000 was held liable at the trial level for \$9.2 million.⁹³ The paper, insured for \$1 million, could not afford an appeal bond to keep the plaintiff from trying to collect the judgment during appeal and sought protection from the bankruptcy court to stop the collection efforts. It could not pursue its appeal in the state courts, and ultimately settled for \$1.4 million. Although some small media might conclude that no insurance can help them, it appears that the number of uninsured media is shrinking. It is not clear, however, how quickly this is happening or how it is influencing editorial decisions.

IV Conclusion

An analysis of these cases and the data is revealing. On the

from newspapers that requested anonymity. The city magazine figure is a rough estimate made by an insurer.

In all cases in this note, legal defense costs are included. But surcharges may be imposed. See *infra* note 91.

91. The most commonly surcharged states are California and South Carolina. Some may surcharge in as many as nine states. See Franklin, *Winners and Losers and Why*, *supra* note 78, at 494 (listing other states).

92. See *supra* note 90.

93. See Curley, *How Libel Suit Sapped The Crusading Spirit Of a Small Newspaper*, Wall St. J., Sept. 29, 1983 at 1, col. 1. Part of the litigation is discussed in *Green v. Alton Telegraph Printing Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203, 63 Ill. Dec. 465 (1982) (holding that the bankruptcy filing had deprived the state appellate courts of jurisdiction of the appeal on the merits).

analytical level, the prediction that an ordinary negligence standard would produce uncertainty has been realized. Reliable information about the nature of negligence has not emerged from a decade of litigation. On the contrary, *Gertz* cases with similar facts may be resolved in conflicting manners.⁹⁴ Yet the fact that the ordinary negligence standard has not produced clear rules does not mean that its use will result in self-censorship. The argument that self-censorship will result assumes that there is little financial incentive to publish stories that might produce litigation. Professor Robertson has observed that "some economic incentive to publish the stories must exist or publishers would not print them even under a knowing or reckless falsity standard."⁹⁵ Moreover, media leaders are reluctant to admit that legal rules might inhibit what they think are proper practices or coverage.⁹⁶ On the other hand, that reality or appearance is rarely found among the less stable and smaller media which see bankruptcy and great inconvenience as realistic threats.⁹⁷

Professor Tribe observed that because of its "heavy dependence on how jurors will react, 'fault' is not a standard which promises the predictable results or creates the certain expectations without which journalists and others may too often 'kill' or emasculate reports they believe to be true because of the threat of a libel action."⁹⁸ He concluded that the states should be required "to develop bodies of law markedly clearer and

94. See *supra* text accompanying note 52.

95. Robertson, *supra* note 2, at 260.

96. E.g., Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 MONT. L. REV. 71, 87 (1983) ("not many can claim, as does the *Washington Post*, that libel litigation has not changed their editorial practices," citing a conversation with the newspaper's counsel). See also, Friendly, *Investigative Journalism Is Changing Some of Its Goals and Softening Tone*, N.Y. Times, Aug. 23, 1983 at 8, col. 1.

97. Curley, *supra* note 93, reported that after the *Alton Telegraph's* horrendous experience, the paper's publisher rejected the opportunity to investigate another episode of alleged official misdoing, saying, "Let someone else stick their neck out this time." The same article reports the tribulations of a very small monthly newspaper (circ. 1,300) that was sued for \$20 million by a large milk cooperative. The case was dismissed after a year. The editor and publisher "lost his girlfriend and months of work as a result of exhausting legal preparations." *Id.* at 1, col. 1. The same story is reported in *The Little Guy in the Big Suit*, COLUM. J. REV., Jan./Feb. 1983, at 42-43 (reciting the burdens of travel, document searches, phone calls, and two occasions on which the editor had to combine issues to keep his publishing schedule). These situations are hard to document because, as reported by Friendly, *supra* note 96, "reporters or television news directors do not openly discuss the chances they do not take."

98. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 645 (1978).

more coherent than is customary in the common law of negligence.”⁹⁹ He went even further in addressing the availability of summary judgment when he warned that it might be necessary “to distill from the decisional law a collection of publishing ‘rules of the road’ which, if followed, will shield prudent publishers from defamation actions.”¹⁰⁰ No markedly clearer body of law has evolved and no rules of the road have evolved that offer any serious hope of obtaining summary judgment. Even though it is difficult to document the predicted self-censorship,¹⁰¹ there is every reason to expect such reaction in the face of uncertainty.

In fact, the media face a situation even worse than doctrinal uncertainty. The actual results *are* predictable: the substantive protection offered by an ordinary negligence standard is minimal at every stage up to the appeals. The Restatement’s warning that *res ipsa loquitur* be used sparingly, if at all, because it might lead to liability without fault,¹⁰² has proven to be meaningless. In every reported case, the plaintiff has made some effort to show negligence. After all, if the story is false, *some* further check would almost certainly have shown this—and the plaintiff seizes on the most plausible of these unmade inquiries.

It appears, then, that summary judgments are few and far between, that juries are willing to impose liability in virtually all cases of claimed negligence, that trial judges are granting few judgments n.o.v., and that at least one appeal is required simply to present the case to an appellate court that is unlikely to use rigorous review standards. The constitutional protection actually being afforded media under the *Gertz* standard has, at best, been minimal.

As serious as these matters are for all media, they are especially likely to affect small media adversely. First, there is the greater likelihood that they are uninsured or perhaps underinsured, which should create greater averseness to risk than is found among large media. Second, to the extent that small me-

99. *Id.*

100. *Id.* at 646.

101. This is true for the reasons cited in Friendly, *supra* note 96. Even if one could document a decline in investigative reporting, it would be difficult to connect it with the impact of libel law. See O’Neill, *The Ebbing of the ‘great investigative wave’*, ASNE BULLETIN, Sept. 1983, at 26 (identifying several reasons for the decline in investigative reporting but not mentioning legal concerns).

102. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1976).

dia and investigative journals do engage in investigative reporting, they may find themselves writing about powerful private people in the community—people who might be called private under *Gertz*.¹⁰³ The perverse consequence would be that the smaller media, who are already less secure financially, are likely to face greater exposure to liability than the large media. Third, small media are less likely to face direct competition for circulation from the same or other media. This may mean that they have less need to engage in investigative reporting or controversy, generally, than might be the case with the large, urban media. After the demoralizing story of the *Alton Telegraph* it will be more difficult to persuade small media owners to run the risk of being sued.

The cases also reveal an important, though narrow, problem that occurs when the alleged source's testimony conflicts with that of the reporter. This problem will often arise in cases falling into the first two groups of cases. Although credibility conflicts also occur in non-media negligence cases, they are particularly acute here because of the incentive for witnesses to lie, the difficulty of disproving their testimony, and the jury's general tendency to favor plaintiffs in libel cases.

Sources have an incentive to lie at trial for two reasons. First, they may wish to disavow statements that were originally made without anticipating their repercussions.¹⁰⁴ Second, witnesses may lie to avoid being named as defendants in a libel suit. This problem arises whenever a source has, for whatever reason, given inaccurate information that may subject him to liability. Given the propensity of jurors to favor plaintiffs,¹⁰⁵ the fault requirement may offer the media little protection in these cases.¹⁰⁶ Although the "actual malice" as-

103. But see Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 *FORDHAM L. REV.* 1382, 1424 (1977) (suggesting that persons who achieve prominence in small communities are likely to be called public figures. The author seeks to protect small media in such cases by barring public figures from recovering punitive damages.).

104. *Schrottman v. Barnicle* may be an example of this. It is notable that in addition to suing for libel, Schrottman also sued the reporter for invasion of privacy, arguing that Barnicle never identified himself as a reporter. It is not implausible to think that Schrottman did make the quoted statement but did not expect it to be printed in the local paper. Cf. LaRue, *Living with Gertz: A Practical Look at Constitutional Libel Standards*, 67 *VA. L. REV.* 287, 293 (1981).

105. See *supra* text accompanying note 78. In addition, several of the cases discussed in the text reveal jury verdicts that can be explained only in terms of the jury's resolving the credibility conflict against the reporter.

106. LDRC, *supra* note 75.

pect of the *Times* standard may offer little additional protection in pure credibility disputes,¹⁰⁷ the requirement of clear and convincing proof may induce courts to grant summary judgments or judgments n.o.v. in such cases.¹⁰⁸ The nature of source-reporter conflicts helps to explain why reporters would like to engage in secret tape recording to create and preserve a credible record.¹⁰⁹

The overall picture justifies the great concern that many have expressed over the operation of the *Gertz* approach during the past decade.¹¹⁰ Most of the criticism has been directed at the public-private distinction. Some critics have objected that the Court has adopted the wrong approach by relying on the nature of the plaintiff rather than on the subject matter of the communication¹¹¹ or on a combination of the two criteria.¹¹² Others have objected that even assuming the correctness of the public-private distinction, the Court has provided little guidance in helping lawyers or media predict with any accuracy which regime will be held applicable in a specific case.¹¹³ Beyond these problems, the limitation of actual injury damages

107. Since the issue is credibility, a jury determination that the reporter is the one to be disbelieved can be reached on the basis that the reporter's memory has failed him or that he is lying on the witness stand. The varying levels of fault in *Gertz* and *Times* may not be effective to protect media in such a situation. See LaRue, *supra* note 104.

108. See *Firestone v. Time, Inc.*, 460 F.2d 712, 722-23 (5th Cir. 1972) (Bell, J., specially concurring) (arguing that the clear and convincing proof standard be applied to proving the article false), *cert. denied*, 409 U.S. 875 (1972).

109. Consider, e.g., the use of a recorder in *E.W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700 (Ky. Ct. App. 1978), wherein two sources contradicted at trial information they had allegedly given a newspaper reporter who was attempting to verify his story. See also, *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977) (statutory prohibition of taping of conversations without all parties' consent held constitutional), *appeal dismissed*, 435 U.S. 920 (1978) (Brennan, White and Blackmun, JJ., dissenting) (no substantial federal question). See also Cunningham, *Ombudsmen, Council ponder phone taping*, EDITOR & PUBLISHER, Aug. 27, 1983, at 38 (discussion of secret taping).

110. E.g., Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811; McCarthy, *How State Courts Have Responded to Gertz in Setting Standards of Fault*, 56 JOURNALISM Q. 531 (1979); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 631-51 (1978).

111. E.g., Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan*, 25 ST. LOUIS U.L.J. 501, 502 (1981).

112. E.g., A. COX, FREEDOM OF EXPRESSION 19 (1981).

113. E.g., Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1224 (1976) ("Neither the values that are protected by free speech nor those protected by the recognition of a tort action to protect reputation can be safeguarded and promoted when the resolution of the competing values necessitates a large number of difficult decisions.").

has not offered much protection.¹¹⁴

This article has addressed a still different aspect of *Gertz*: the operation of the negligence principle it established. The results suggest that here too, the *Gertz* approach has failed. This failure is so clear and so serious that it alone should justify renewing the search for acceptable standards in libel cases. The fact that other aspects of the case are also unsatisfactory should only hasten that day.

114. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court adopted an expansive view of the phrase "actual injury damages." The result was that in a study of three and one-half years of reported litigation, only one court "found the showing inadequate." Franklin, *Winners and Losers and Why*, *supra* note 78, at 493 n.83. See *TRIBE, supra* note 98, at 648 ("The point is not that intangible injuries such as humiliation and anguish are insignificant or not deserving of compensation, but rather that the rule requiring proof of damages this broadly defined does not succeed in its aim of limiting jury discretion.").

